

Apr 30, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHRISTOPHER D.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:18-CV-00170-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 12, 14. Attorney Lora Lee Stover represents Christopher D. (Plaintiff); Special Assistant United States Attorney Alexis Toma represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. §§ 405(g), 1383(c).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on March 24, 2014, Tr. 147, 159, alleging

1 disability since November 30, 2013, Tr. 300, 302, due to mental health issues and
2 knee issues, Tr. 333. The applications were denied initially and upon
3 reconsideration. Tr. 197-200, 203-07. Administrative Law Judge (ALJ) Mark
4 Kim held a hearing on August 10, 2016 and continued the hearing for Plaintiff to
5 obtain legal representation. Tr. 82-95. The ALJ held a second hearing on
6 February 7, 2017 and heard testimony from Plaintiff, medical expert Stephen
7 Rubin, Ph.D., and vocational expert Fred Cutler. Tr. 96-146. The ALJ issued an
8 unfavorable decision on March 27, 2017. Tr. 41-56. The Appeals Council denied
9 review on April 3, 2018. Tr. 1-7. The ALJ's March 27, 2017 decision became the
10 final decision of the Commissioner, which is appealable to the district court
11 pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this action for judicial
12 review on May 23, 2018. ECF Nos. 1, 4.

13 **STATEMENT OF FACTS**

14 The facts of the case are set forth in the administrative hearing transcript, the
15 ALJ's decision, and the briefs of the parties. They are only briefly summarized
16 here.

17 Plaintiff was 50 years old at the alleged date of onset. Tr. 300. Plaintiff
18 completed two years of college in 2012. Tr. 334. His reported work history
19 includes the jobs of forklift driver, group therapist, laborer, line cook, skills coach,
20 dock worker, post commander, detailer, and Atta lift operator. Tr. 334, 340. When
21 applying for benefits Plaintiff reported that he stopped working on November 30,
22 2013 because of his conditions. Tr. 333. Plaintiff reported working since applying
23 for benefits. Tr. 409-10. Income records show as many as six different employers
24 since the alleged date of onset. Tr. 317-24.

25 **STANDARD OF REVIEW**

26 The ALJ is responsible for determining credibility, resolving conflicts in
27 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
28 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,

1 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
2 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
3 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
4 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
5 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
6 another way, substantial evidence is such relevant evidence as a reasonable mind
7 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S.
8 389, 401 (1971). If the evidence is susceptible to more than one rational
9 interpretation, the court may not substitute its judgment for that of the ALJ.
10 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
11 findings, or if conflicting evidence supports a finding of either disability or non-
12 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
13 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
14 evidence will be set aside if the proper legal standards were not applied in
15 weighing the evidence and making the decision. *Browner v. Secretary of Health*
16 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

17 **SEQUENTIAL EVALUATION PROCESS**

18 The Commissioner has established a five-step sequential evaluation process
19 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
20 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
21 through four, the burden of proof rests upon the claimant to establish a prima facie
22 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
23 burden is met once the claimant establishes that physical or mental impairments
24 prevent him from engaging in his previous occupations. 20 C.F.R. §§ 404.1520(a),
25 416.920(a)(4). If the claimant cannot do his past relevant work, the ALJ proceeds
26 to step five, and the burden shifts to the Commissioner to show that (1) the
27 claimant can make an adjustment to other work, and (2) specific jobs which the
28 claimant can perform exist in the national economy. *Batson v. Comm'r of Soc.*

1 *Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant cannot make
2 an adjustment to other work in the national economy, he is found “disabled.” 20
3 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

4 **ADMINISTRATIVE DECISION**

5 On March 27, 2017, the ALJ issued a decision finding Plaintiff was not
6 disabled as defined in the Social Security Act from November 30, 2013 through
7 the date of the decision.

8 At step one, the ALJ found Plaintiff had engaged in substantial gainful
9 activity from June 25, 2015 through September 30, 2015. Tr. 43. However, the
10 ALJ addressed the remaining steps for the entire alleged period of disability, “for
11 completeness.” Tr. 44.

12 At step two, the ALJ determined that Plaintiff had the following severe
13 impairments: osteoarthritis of both knees; degenerative disc disease of the lumbar
14 spine; depressive disorder; generalized anxiety disorder; and obsessive-compulsive
15 disorder. Tr. 44.

16 At step three, the ALJ found that Plaintiff did not have an impairment or
17 combination of impairments that met or medically equaled the severity of one of
18 the listed impairments. Tr. 44.

19 At step four, the ALJ assessed Plaintiff’s residual function capacity and
20 determined he could perform a range of light work with the following limitations:

21 [H]e can never climb ladders or scaffolds; he can never crouch or crawl;
22 he can occasionally stoop, kneel, and climb ramps and stairs; he is
23 limited to work involving simple routine tasks with no production rate
24 or pace work; and finally, he is limited to work involving occasional
25 and only superficial interaction with the public, and occasional
interaction with coworkers.

26 Tr. 47. The ALJ identified Plaintiff’s past relevant work as industrial truck
27 operator, short order cook, merchant patroller, stores laborer, hand packager,
28 kitchen helper, children’s institutional attendant, and substance abuse counselor.

Tr. 55. The ALJ found that he could not perform this past relevant work. Tr. 54-55.

At step five, the ALJ determined that, considering Plaintiff's age, education, work experience and residual functional capacity, and based on the testimony of the vocational expert, there were other jobs that exist in significant numbers in the national economy Plaintiff could perform, including the jobs of housekeeping cleaner, cafeteria attendant, and agricultural sorter. Tr. 55-56. The ALJ concluded Plaintiff was not under a disability within the meaning of the Social Security Act from November 30, 2013, through the date of the ALJ's decision. Tr. 56.

ISSUES

The question presented is whether substantial evidence supports the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh his symptom statements, (2) failing to make a proper residual functional capacity determination, and (3) failing to make a proper step five determination.

DISCUSSION¹

1. Plaintiff's Symptom Statements

Plaintiff contests the ALJ's determination that Plaintiff's symptom statements were unreliable. ECF No. 12 at 12-15.

It is generally the province of the ALJ to make determinations regarding the

¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held that ALJs of the Securities and Exchange Commission are "Officers of the United States" and thus subject to the Appointments Clause. To the extent *Lucia* applies to Social Security ALJs, the parties have forfeited the issue by failing to raise it in their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not specifically addressed in an appellant's opening brief).

1 reliability of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the
2 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
3 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
4 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
5 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
6 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:
7 rather the ALJ must identify what testimony is not credible and what evidence
8 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

9 The ALJ found Plaintiff's statements concerning the intensity, persistence,
10 and limiting effects of his symptoms to be "not entirely consistent with the medical
11 evidence and other evidence in the record." Tr. 47. Specifically, the ALJ stated
12 that "[t]he medical evidence shows that the claimant's condition is generally
13 controlled and responsive to treatment." *Id.*

14 This is the only reason for rejecting the symptom statements that Plaintiff
15 identified in ALJ's decision. ECF No. 12 at 13. In contrast, Defendant argues that
16 the ALJ provided four reasons: (1) Plaintiff's statements were inconsistent with
17 the medical evidence showing Plaintiff's symptoms were generally controlled and
18 responsive to treatment; (2) Plaintiff's statements were contradicted by multiple
19 examining and non-examining opinions; (3) Plaintiff's statements were
20 undermined by Plaintiff's work activity during the relevant period; and (4)
21 Plaintiff's statements were unsupported by medical examinations and mental status
22 findings. ECF No. 14 at 7.

23 Here, the ALJ's determination that Plaintiff's symptom statements were not
24 supported by the medical evidence, is clearly stated in the decision and identified
25 by both parties as a reason provided by the ALJ. Tr. 47; ECF No. 12 at 13; ECF
26 No. 14 at 7. However, this reason standing alone is insufficient to support the
27 ALJ's adverse determination regarding Plaintiff's symptom statements. Objective
28 medical evidence is a "relevant factor in determining the severity of the claimant's

1 pain and its disabling effects,” but it cannot be the only reason for rejecting a
2 claimant’s statements regarding his symptoms. *Rollins v. Massanari*, 261 F.3d
3 853, 857 (9th Cir. 2001). Furthermore, the ALJ failed to make any direct
4 comparisons between Plaintiff’s testimony and the medical evidence in the record.
5 The ALJ summarized Plaintiff’s statements in a function report and at the hearing.
6 Tr. 47. He then summarized the physical medical evidence and concluded that the
7 evidence supported the residual functional capacity determination. Tr. 47-49.
8 Finally, he summarized the psychological medical evidence and concluded that the
9 evidence supported the residual functional capacity determination. Tr. 49-50. At
10 no point did the ALJ connect any specific medical evidence as undermining any
11 specific statement by Plaintiff regarding his symptoms. Therefore, this is
12 insufficient to meet the specific, clear and convincing standard. *See Lester*, 81
13 F.3d at 834 (“General findings are insufficient: rather the ALJ must identify what
14 testimony is not credible and what evidence undermines the claimant’s
15 complaints.”); *See Brown-Hunter v. Colvin*, 806 F.3d 487, 494 (9th Cir. 2015)
16 (“Because the ALJ failed to identify the testimony she found not credible, she did
17 not link that testimony to the particular parts of the record supporting her non-
18 credibility determination. This was legal error.”).

19 Defendant argues that Plaintiff’s challenge to the ALJ’s determination is
20 inadequate. ECF No. 14 at 8. The Court generally agrees. Plaintiff’s entire
21 argument consists of asserting that Plaintiff has provided evidence sufficient to
22 support his reported symptoms and their alleged severity and that no providers
23 challenged his credibility. ECF No. 12 at 13-14. This would typically be
24 insufficient to challenge the ALJ’s treatment of Plaintiff’s symptom statements as
25 it amounts to asking the Court to reweigh the evidence, which is not the Court’s
26 role. *See Tackett*, 180 F.3d at 1097 (If the evidence is susceptible to more than one
27 rational interpretation, the court may not substitute its judgment for that of the
28 ALJ.); *Andrews*, 53 F.3d at 1039 (The ALJ is responsible for determining

1 credibility, resolving conflicts in medical testimony, and resolving ambiguities.).
2 However, the ALJ failed to provide a single, specific reason for rejecting
3 Plaintiff's symptom statements beyond that they were unsupported by the medical
4 evidence. *See infra*. Therefore, under *Rollins*, the ALJ erred in his treatment of
5 Plaintiff's symptom statements, and a remand is required for the ALJ to evaluate
6 Plaintiff's symptom statements properly.

7 The next two reasons Defendant identifies as the ALJ's reasons for rejecting
8 Plaintiff's symptom statements amount to *post hoc* rationalizations. *See Orn v.*
9 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (The Court will "review only the reasons
10 provided by the ALJ in the disability determination and may not affirm the ALJ on
11 a ground upon which he did not rely."). While the ALJ discussed the opinions of
12 examining and non-examining providers, the ALJ never specifically concluded this
13 reason undermined Plaintiff's statements. Tr. 50-54. Instead, the ALJ found that
14 the medical opinions "show that the claimant retains considerable work-related
15 abilities." Tr. 50. Likewise, the ALJ discussed Plaintiff's work during the relevant
16 period, but did not conclude the reason undermined Plaintiff's statements. Tr. 49.
17 Instead, the ALJ found that the work activity following the alleged date of onset
18 contributed towards the "[b]alance of evidence" supporting the residual functional
19 capacity determination. *Id.*

20 An ALJ is required to provide reasons that are "sufficiently specific to allow
21 a reviewing court to conclude that the adjudicator rejected the claimant's testimony
22 on permissible grounds and did not 'arbitrarily discredit a claimant's testimony
23 regarding pain.'" *Bunnell v. Sullivan*, 947 F.2d 341, 345-56 (9th Cir. 1991)
24 (quoting *Elam v. Railroad Retirement Bd*, 921 F.2d 1210, 1215 (11th Cir. 1991)).
25 The Ninth Circuit stated that the finding in *Bunnell* was intended to supplement the
26 preexisting "clear and convincing" standard with the requirement that the reasons
27 provided by the ALJ must also be "specific." *Burrell v. Colvin*, 775 F.3d 1133,
28 1137 (9th Cir. 2014). "The clear and convincing standard is the most demanding

required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)). Therefore, without a specific finding by the ALJ that he rejected Plaintiff’s statements based on the opinions of examining and non-examining providers and based on Plaintiff’s work activity, these reasons amount to *post hoc* rationalizations, which will not be considered by the Court.

The remaining reason Defendant attributes to the ALJ’s decision, that Plaintiff’s symptom statements were unsupported by medical examinations and mental status findings, is the same as the ALJ’s conclusion that the statements were not supported by the medical evidence, Tr. 49, and has been found to not meet the specific, clear and convincing standard. *See supra*.

Therefore, the case is remanded for the ALJ to evaluate Plaintiff’s symptom statements in light of the prevailing case law and the requirements set forth in S.S.R. 16-3p.

2. Residual Functional Capacity Determination

Plaintiff challenges the ALJ’s residual functional capacity determination by generally asserting that his limitations were not adequately addressed and should have resulted in a restricted range of sedentary work. ECF No. 12 at 15. Additionally, Plaintiff asserts that the ALJ failed to include Dr. Rubin’s opined limitation that he should work alone. *Id.* at 16.

In forming the residual functional capacity determination, the ALJ is required to consider Plaintiff’s statements regarding his symptoms and their resulting limitations. 20 C.F.R. §§ 404.1545(a)(3), 416.945(a)(3). Since the case is being remanded for the ALJ to perform a new evaluation of Plaintiff’s symptom statements, a new residual functional capacity determination will also be required.

3. Step Five

Plaintiff challenges the ALJ’s step five determination by asserting that the hypothetical presented to the vocational expert was incomplete and should have

1 included Dr. Rubin's opined limitation that he work alone. ECF No. 12 at 16.
2 Additionally, Plaintiff argues that the jobs the vocational expert identified as ones
3 he could perform, housekeeping cleaner, cafeteria attendant, and agricultural
4 sorter, require a worker to maintain pace and production, which is inconsistent
5 with the testimony of the vocational expert requiring absenteeism and being off
6 task. *Id.* at 15-16.

7 At step five, the burden shifts to the Commissioner to show that (1) the
8 claimant can make an adjustment to other work, and (2) specific jobs which the
9 claimant can perform exist in the national economy. *Batson*, 359 F.3d at 1193-94.
10 In making this determination, the ALJ must consider a claimant's residual
11 functional capacity and vocational factors. 20 C.F.R. §§ 404.1520(a)(4)(v),
12 404.1520(g), 416.920(a)(4)(v) 416.920(g). Therefore, a new step five
13 determination will be required upon remand following the ALJ's new residual
14 functional capacity determination.

15 **REMEDY**

16 Plaintiff requests the Court to apply the credit-as-true rule and remand this
17 case for an immediate award of benefits. ECF No. 12 at 16.

18 The decision whether to remand for further proceedings or reverse and
19 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
20 888 F.2d 599, 603 (9th Cir. 1989). Under the credit-as-true rule, where (1) the
21 record has been fully developed and further administrative proceedings would
22 serve no useful purpose, (2) the ALJ has failed to provide legally sufficient reasons
23 for rejecting evidence, whether claimant testimony or medical opinion, and (3) if
24 the improperly discredited evidence were credited as true, the ALJ would be
25 required to find the claimant disabled on remand, we remand for an award of
26 benefits. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Even when the
27 three prongs have been satisfied, the Court will not remand for immediate payment
28 of benefits if "the record as a whole creates serious doubt that a claimant is, in fact,

1 disabled.” *Garrison*, 759 F.3d at 1021.

2 Here, Plaintiff submitted additional medical evidence to the Appeals
3 Council, Tr. 2, 8-32, and attached additional medical evidence to his briefing in
4 this Court, ECF No. 12-1. This continued submission of evidence demonstrates
5 that the record before the ALJ was not complete and further administrative
6 proceedings are required. Upon remand, the ALJ will gather any outstanding
7 medical evidence, evaluate Plaintiff’s symptom statements, make a new residual
8 functional capacity determination, and make a new step five determination.

9 **CONCLUSION**

10 Accordingly, **IT IS ORDERED:**

11 1. Defendant’s Motion for Summary Judgment, **ECF No. 14**, is
12 **DENIED**.

13 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 12**, is
14 **GRANTED, in part**, and the matter is **REMANDED** for additional proceedings
15 consistent with this Order.

16 3. Application for attorney fees may be filed by separate motion.

17 The District Court Executive is directed to file this Order and provide a copy
18 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
19 **and the file shall be CLOSED.**

20 DATED April 30, 2019.



A handwritten signature in black ink, appearing to be "M", is written above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE